Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BLUE STREAK, INC.,
BLUE STREAK OPERATIONS, INC.,
BLUE STREAK MARINE, INC.
and BLUE STREAK OFFSHORE, INC
PETITIONER

vs.

GULF ISLAND IV, INC.,
and GULF ISLAND-IV, a Louisiana Partnership
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In Blonder-Tongue, this court abolished the mutuality of estoppel rule for the doctrine of issue preclusion (collateral estoppel). Is there any valid reason for the mutuality of estoppel rule to apply to the doctrine of claim preclusion? Stated another way, can a plaintiff bring successive lawsuits for the same claim merely by adding new defendants to the lawsuit?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE FIFTH CIRCUIT COURT OF APPEALS[1]

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[1] In accordance with Rule 29 of the Rules of the Supreme Court of the United States, notation is hereby made that there are no other parent or subsidiary companies to those listed here.

Ronald Pateman, Representative of
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PRIOR RULINGS IN THIS CASE BY THE TRIAL COURT AND THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS:

The opinion of the Fifth Circuit Court of Appeals appears at 24 F.3d 743 (5th C., 1994), and is contained in Appendix A. The denial of an application for rehearing was entered on October 7, 1994, and is contained in Appendix B. The order and reasons by Judge Martin L. C. Feldman, United States District Court for the Eastern District of Louisiana appears at Appendix C, and his entry of final judgment pursuant to Rule 54(b) appears at Appendix D.

JURISDICTION

The opinion of the Court of Appeals was filed on July 5, 1994. A timely Petition for Rehearing was filed on July 19, 1994, and the Court of Appeals denial of that petition for rehearing was entered on October 7, 1994. This Court's jurisdiction is invoked under Title 28, U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the issues of claim preclusion and issue preclusion under federal doctrine. These doctrine are basically jurisprudential. In this petition, we also cite Federal Rules of Civil Procedure, Rules 13 and 19, which are reproduced in Appendix E.

STATEMENT OF THE CASE

The Gulf Island IV was a liftboat owned by the partnership Gulf Island IV, a Louisiana Partnership. The complainants/respondents are various related entities which all claim some interest in the vessel and will hereafter be collectively referred to as Gulf Island. The liftboat was being operated by a partnership known as Blue Streak-Gulf Island Operations when it collapsed in the Gulf of Mexico in June of 1985. Employers Insurance of Wausau (Wausau) carried both hull insurance and protection and indemnity insurance on the vessel. In 1985, Gulf Island sued Wausau, and in that suit alleged that the cause of the collapse was crew negligence. If the cause of the collapse was unseaworthiness of the vessel, the Wausau policies would not provide coverage. Another lawsuit was filed by Hope Contractors, Inc., which named Blue Streak/Gulf Island as a defendant. Gulf Island third partied Wausau on that complaint. That suit was consolidated with the 1985 suit by Gulf Island.

In 1986, that lawsuit was dismissed by a standard 60 day dismissal, after Gulf Island's counsel advised the court of a settlement. This settlement included payments by Wausau to Gulf Island in the connected cases for the repair of the vessel on behalf of Gulf Island and BS-GIO, and Wausau had settled a number of personal injury cases arising out of the collapse. In addition to those payments, Wausau also had agreed to pay Gulf Island $1000.00 to settle the remainder of its claims. Apparently, Gulf Island chose to not accept this money, believing the release was too broad.

However, Gulf Island did not advise

the Court of their refusal of the settlement and did not ask that the 60 day dismissal be reversed, nor did they ask that the case be reopened. Instead, citing the admiralty and maritime jurisdiction of the federal courts, Gulf Island filed this lawsuit in 1988, naming Wausau and Blue Streak Operations, Inc., Blue Streak Marine, Inc. and Blue Streak Offshore, Inc., claiming that each of those entities has some form or another of vicarious liability for BS-GIO. Each of these Blue Streak entities denies any liability that would derive from any fault chargeable to BS-GIO, however for the sake of this petition they may be referred to collectively as Blue Streak.

Pateman's underwriters were added later, and Wausau was subsequently dismissed via summary judgment. That dismissal was upheld on appeal.

After the case was remanded, Blue Streak filed a Motion for Summary Judgment, claiming that the 1985 lawsuit and final dismissal precludes this refiled claim. Pateman's underwriters had joined in this motion, and both were granted by Judge Feldman, who then certified those judgments as final pursuant to Rule 54(b).

Gulf Island appealed the granting of both summary judgments. The Fifth Circuit Court of Appeals reversed the trial judge's rulings, in effect holding that a plaintiff can file successive lawsuits on a single cause of action so long as the defendants in the second suit are not the same or in privity with the defendants in the first suit.

REASONS FOR GRANTING WRIT

Certiorari should be granted because this case presents for review an important question of federal law which has not yet been ruled on by this Court, but should be. *In Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation,*[2] this Court did away with the mutuality rule in cases of collateral estoppel (issue preclusion), but the courts of appeals continue to apply the mutuality rule to cases of res judicata (claims preclusion). This is unsound legal reasoning and is a burden on the federal judiciary, and therefore we ask this Court to grant Writs of Certiorari to review the decision of the Fifth Circuit upholding the mutuality rule in cases of claims preclusion.

SOUND LEGAL REASONING.

In *Blonder-Tongue*, this Court cited with approval the decision of the California Supreme Court in
[3], when it said "there was 'no compelling reason * * * for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.'"

In *Bernhard v. Bank of America*, the Court stated the question as, "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

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[2] 91 S.Ct. 1434; 28 L.Ed.2d 788; 402 U.S. 313 (1971).

[3] 19 Cal.2d 807, 122 P.2d 892 (1942).

This Court then went to great lengths to show that *Bernhard v. Bank of America* has "proved its merit" and that it is "a shining landmark of progress in justice and law administration."

Blonder-Tongue dealt with collateral estoppel, or as it is now referred to, issue preclusion. We are unaware of any case by the United States Supreme Court which has limited the holding in that case to claims of issue preclusion, but the Courts of Appeal have done just that.

In deciding that the mutuality rule still applies to claims preclusion cases, the Fifth Circuit cited *Allen v. McCurry*[4]. That case dealt with collateral estoppel (issue preclusion), and specifically concerned whether or not a state court decision could bar a federal § 1983 suit. The respondent had lost a motion to suppress evidence in his state court criminal proceeding, and then filed his § 1983 action in federal court, claiming that the search of his apartment and seizure of evidence was unlawful, and in furtherance of a conspiracy to deprive him of his constitutional rights. The holding was that since he had his full and fair opportunity to litigate his claim, he was barred from asserting it his § 1983 suit. The principle behind this holding is clear: for every common nucleus of operative facts there should be one lawsuit. That this case is being cited for the proposition that Gulf Island should get two opportunities to litigate its claim is a clear indication that it is time for this Court to clarify the rule.

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[4] 449 U.S. 90, 94-95; 101 S.Ct. 411, 415; 66 L.Ed.2d 308 (1980).

In this case, the Fifth Circuit noted, "'Unfortunately, the terminology used in this area of the law often breeds confusion.'" *Gulf Island-IV v. Blue Streak*, supra, at page 746. We submit that it is not the terminology which breeds confusion, but that applying the mutuality rule to claims preclusion and not issue preclusion is an unsound distinction, and those of us who believe that the law should make good sense disagree with the distinction.

Federal doctrine, especially procedural doctrine, should be consistent with the Federal Rules of Civil Procedure. Those rules contemplate that there be one lawsuit to resolve all disputes which arise out of a common nucleus of operative facts. Thus, Rule 13 requires any defendant is a lawsuit to file all counterclaims arising out of that same occurrence, and Rule 19 requires a complainant to join everyone necessary for a complete relief. The principle is clear, for every common nucleus of operative facts, there should be one lawsuit.

BURDEN ON THE FEDERAL JUDICIARY.

The United States Judiciary has kept statistics on the number of filings and the length of time it takes to have a case tried and reports them in the United States District Courts.• National Judicial Workload Profile. *Blonder-Tongue* was decided in 1971, and in that year, 233 civil actions per judgeship were filed. In 1993, that number increased to 354, and increase of more than 50%. In 1971, the median length of time from the joining of issue in a civil case until trial was 11 month. In 1993, it took 16 month, an increase of almost 50%.

CONCLUSION

It is time for this Court to adopt fully the well reasoned "shining landmark of progress in justice and law administration" and apply its principles to claim preclusion as well as issue preclusion, and we respectfully request this Court to grant Writs of Certiorari to review the decision of the United States Fifth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED:

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APPENDICES

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Appendix A: Opinion of the Fifth Circuit Court of Appeals in Gulf Island-IV, Inc., et al. vs. Blue Streak-Gulf Is. Ops., et al. reported at 24 F.3d 743 (5th C., 1994).

GULF ISLAND-IV, INC. and Gulf Island IV a/k/a La Prt, Plaintiffs-Appellants,

v.

BLUE STREAK-GULF IS OPS a/k/a Blue Streak Inc., et al. and Lloyds Underwriters of London, Underwriters at Lloyds, London subscribing to policy No. MC9792SAH,

Defendants-Appellees.

No. 93-3539.

United States Court of Appeals,

Fifth Circuit.

July 5, 1994.

Rehearing Denied Oct. 7, 1994.

After bringing action against its own insurers in connection with damage to its vessel, owner brought action against vessel operator and its insurer. The United States District Court for the Eastern District of Louisiana, Martin L.C. Feldman, J., granted summary judgment for operator and insurer on res judicata grounds, and owner appealed. The Court of Appeals, Benavides, Circuit Judge, held that: (1) both parties had to be identical to or in privity with parties in prior suit for res judicata to apply; (2) identity of parties requirement was not satisfied where operator alleged that it was in privity with unserved defendant in prior suit, and (3) operator was not in privity with owner's insurer in prior suit.

Reversed and remanded.

John T. Nesser, III, Liane K. Hinrichs, Elton A. Foster, Nesser, King & LeBlanc, New Orleans, LA, for appellants.

Steven J. Koehler, Richard K. Leefe, Leefe, Gibbs & Koehler, Metairie, LA, for Blue Streak, et al.

Charles M. Steen, Stephanie G. McShane, Phelps Dunbar, New Orleans, LA, for Lloyds Underwriters.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, JONES and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

The appellants, "Gulf Island," appeal from the district court's entry of summary judgment based upon res judicata. The appeal involves an attack on the district court's application of the doctrine of res judicata. We reverse.

I. FACTS AND PROCEDURAL HISTORY

In June 1985, the vessel L/B GULF ISLAND IV capsized in the Gulf of Mexico and suffered severe damage. In October 1985, after the vessel had been repaired, Hurricane Juan overturned it, and the vessel suffered additional damage.

According to the parties on appeal, a partnership known as Blue Streak Gulf Island Operations (BS-GIO) was operating the vessel when it collapsed. [FN1][5]

The entity of BS-GIO has dissolved. The two appellants, Gulf Island IV, a Louisiana partnership and owner of the vessel, and Gulf Island IV, Inc., the

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[5] FN1. The court below found that the vessel was operated by and under the exclusive control of: Blue Streak Marine, Inc.; Blue Streak Offshore, Inc.; Blue Streak-Gulf Island Marine Operations, a partnership also known as Blue Streak/Gulf Island Marine Operations, Inc.; and Blue Streak Operations, Inc. April 30, 1993 Order at 1.

managing partner of Gulf Island IV, are referred to as *745 "Gulf Island." [FN2][6] The three appellees collectively referred to as "Blue Streak" are Blue Streak Operations, Inc., Blue Streak Marine, Inc. and Blue Streak Offshore, Inc. Underwriters at Lloyd's, London (Underwriters) had underwritten an umbrella liability insurance policy for Blue Streak and is now the fourth appellee.

In December of 1985, Gulf Island IV filed the first lawsuit, alleging diversity and admiralty and maritime jurisdiction, against their own insurance carriers, Wausau and American Marine Underwriters, Inc. (AMU), seeking damages due to the failure to pay benefits under the hull policy for physical damage to the vessel as a result of both of the above-described 1985 casualties and for downtime of the vessel occurring after the damage wrought by Hurricane Juan.

The vessel was covered by two insurance policies, a hull and machinery policy and a protection and indemnity policy, which were issued by Wausau. Both policies listed the named assured as: Gulf Island Marine; Blue Streak Gulf Island Marine Operations, Inc. (Operator); and Oceanic Fleet, Inc. Ultimately, the parties advised the court that the action had been settled, and, as a result, the court, on September 29, 1986, issued a sixty-day order of dismissal, expressly allowing the right to reopen the action if the settlement had not been consummated. [7] It is undisputed that Gulf Island never moved to reopen the 1985 suit.

Additionally, while that suit was pending, it was consolidated with several other suits, including a suit brought by Hope

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[6] FN2. Gulf Island Marine, Inc., a general partner of Gulf Island IV, is not a party to the case at bar.

Contractors, Inc. In the Hope suit, the plaintiff-contractors named, among others, the following defendants, Gulf Island IV, Gulf Island IV, Inc., Gulf Island Marine, Inc., and Blue Streak/Gulf Island, which was identified as a Louisiana partnership. The Hope contractors sought payment on an account for post-casualty salvage and repairs to the vessel. Gulf Island impleaded AMU [FN3][8] and Wausau, seeking coverage under the hull and machinery policy for the salvage and repairs performed by the Hope contractors.

In June of 1988, Gulf Island brought the instant admiralty and maritime suit against Blue Streak Marine, Inc., Blue Streak Offshore, Inc., and Employers Insurance of Wausau [FN4][9] for negligence, breach of warranty of workmanlike performance in regard to both of the 1985 casualties, and for losses due to downtime of the vessel. Blue Streak then filed a third-party complaint naming Underwriters and seeking coverage under its umbrella policy. Blue Streak also filed a cross-claim against Wausau seeking coverage under its own protection and indemnity insurance policy, alleging that the policy required Wausau to protect and indemnify Blue Streak from the claims asserted by Gulf Island. Gulf Island later supplemented its complaint to name Underwriters as a defendant seeking the benefits of coverage under Blue Streak's umbrella policy.

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[8] FN3. AMU is not a party to the case at bar.

[9] FN4. The court below granted Wausau's motion for summary judgment on the ground that the Protection and Indemnity policy did not provide coverage for damage to Gulf Island IV because it is a scheduled vessel. Wausau is not a party to this appeal.

Blue Streak and Underwriters both filed motions for summary judgment, arguing that res judicata applied as a bar to the proceedings against them on the basis of the court's September 29, 1986 order of dismissal in the prior suit. The district court agreed and granted summary judgment for Underwriters and Blue Streak. Gulf Island now appeals, arguing that the district court erred in finding that res judicata barred the instant claims against both underwriters and Blue Streak.

II. STANDARDS OF REVIEW

[1][2] When a summary judgment is appealed, this Court evaluates a district court's decision to grant summary judgment by reviewing the record under the same standards that the district court applied to determine whether summary judgment was appropriate. *Herrera v. Millsap*, 862 F.2d 1157, 1159 (5th Cir.1989). Therefore, the summary judgment will be affirmed only when this Court is "convinced, after an independent *746 review of the record, that 'there is no genuine issue as to any material fact' and that the movant is entitled to judgment as a matter of law." Id. (quoting *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.*, 832 F.2d 1358, 1364 (5th Cir.1987) and Fed.R.Civ.P. 56(c)). Fact questions must be considered with deference to the nonmovant. *Herrera v. Millsap*, 862 F.2d at 1159. Questions of law are reviewed de novo. Id.

[3][4] As previously set forth, the district court found that the claim were barred by res judicata. Federal law determines the res judicata effect of a prior federal court judgment. *Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169,

1172 (5th Cir.1992). In order for res judicata to apply, the following four requirements must be met. First, the parties in the instant action must be the same as or in privity with the parties in the prior action in question. *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir.1994). Second, the court that rendered the prior judgment must have been a court of competent jurisdiction. Id. Third, the prior action must have terminated with a final judgment on the merits. Id. Fourth, the same claim or cause of action must be involved in both suits. Id.

III. BLUE STREAK'S CLAIM OF RES JUDICATA

[5] Regarding the first requirement, Blue Streak argues that it did not have to be a party (or in privity with a party) to the 1985 action. Instead, Blue Streak argues that only the party against whom the plea of res judicata is asserted (in this case Gulf Island) must be a party to the prior action.

Contrary to Blue Streak's assertion, both parties must be identical to or in privity with the parties in the prior suit for res judicata to apply.

In support of the proposition that it did not have to be a party to or in privity with a party to the prior action, Blue Streak cites *Blonder-Tongue Lab., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Blue Streak's reliance on Blonder-Tongue is misplaced. In *Blonder-Tongue*, the Supreme Court "eliminated the requirement of mutuality in applying *collateral estoppel* to bar relitigation of issues decided earlier in federal-court suits." *Allen v. McCurry*, 449 U.S. 90, 94-95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980) (emphasis added). As this Court has recognized, the doctrine of res judicata, in its broadest sense,

encompasses two distinct preclusion concepts, claim preclusion (res judicata) and issue preclusion (collateral estoppel). *United States v. Shanbaum*, 10 F.3d at 310. "Unfortunately, the terminology used in this area of the law often breeds confusion." Id. Thus, although the *Blonder-Tongue* opinion recites the term "res judicata," it apparently is using it in its broad sense. As the Supreme Court stated *in Allen v. McCurry*, supra, it was the mutuality requirement in the context *of collateral estoppel* that was eliminated.

Recently, *in Russell v. SunAmerica Securities, Inc.*, 962 F.2d at 1172-76, this Court addressed the question whether res judicata should have barred the suit against a defendant-appellee that had not been a party to the prior suit. Addressing the identity of parties requirement of res judicata, this Court explained that "[a] non-party defendant can assert res judicata so long as it is in 'privity' with the named defendant." Id. at 1173. Blue Streak thus cannot dispense with the requirement that "the parties must be identical in the two suits." Id. at 1172.

[6] Gulf Island argues that neither Blue Streak nor Underwriters was ever a party to the prior 1985 suit. Gulf Island admits that "Blue Streak/Gulf Island" was named in the Hope action that was later consolidated with Gulf Island's 1985 action. However, it is undisputed that Blue Streak/Gulf Island was neither served nor appeared in the 1985 suit. This Court has explained "that 'parties' for purposes of res judicata does not mean formal, paper parties only, but also includes parties in interest, that is, that persons whose interests are properly placed before the court by someone with standing to represent them are bound by the

matters determined in the proceeding." *Latham v. Wells Fargo Bank*, N.A., 896 F.2d 979, 983 (5th Cir.1990) (emphasis in original) (internal quotation *747 marks and citations omitted). Therefore, assuming arguendo that Blue Streak is in privity with the named but unserved defendant (Blue Streak/Gulf Island) in the prior 1985 suit, because that entity never was properly before the court in the prior suit, the identity of parties requirement has not been satisfied.

[7] Alternatively, Blue Streak argues that it was in privity with Wausau, the insurer that Gulf Island sued in the 1985 suit. "A non-party ... is adequately represented where a party in the prior suit is so closely aligned to her interests as to be her virtual representative. [citations omitted] This requires more than a showing of parallel interests--it is not enough that the non-party may be interested in the same questions or proving the same facts." *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir.1992) (citation omitted). Gulf Island sued Wausau in the 1985 action not as a third party complaining of the negligence of Blue Streak, but rather as a named insured under its Wausau policy. Although Wausau's interest in certain respects may have been parallel to Blue Streak's in the prior suit, Wausau was not standing in the shoes of Blue Streak, and its interests were not aligned with those of Blue Streak as they conceivably would be in a third-party action. [FN5][10] Rather, Wausau was protecting itself in a hull and machinery insurance policy coverage dispute with one

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[10] FN5. In the court below Blue Streak filed a cross-claim against Wausau, indicating the parties' interests were not identical.

of its own insureds. Consequently, the district court erred in finding that Blue Streak satisfied the identity of parties requirement of res judicata. Because Blue Streak does not meet the first requirement of res judicata, it is unnecessary to review the arguments presented by the parties as to the other requirements of res judicata.

IV. UNDERWRITERS' CLAIM OF RES JUDICATA

[8] Finally, it must be determined whether Gulf Island's claims against Underwriters were barred by res judicata. Underwriters concedes that it was not a named party defendant to the prior 1985 suit. Nevertheless, Underwriters argues that it is entitled to assert the defense of res judicata because Blue Streak is its insured, and thus, it stands in the shoes of Blue Streak. [FN6][11] Underwriters correctly states the proposition that "the direct action insurer stands as a party-litigant in exactly the same shoes as the assured." *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 116 (5th Cir.1963); *Federal Deposit Ins. Corp. v. Mmahat*, 960 F.2d 1325, 1330 n. 10 (5th Cir.1992). However, this argument offers Underwriters no succor in that this Court has determined that Blue Streak was not entitled to summary judgment on the basis of res judicata. Because res judicata does not bar the suit against Blue Streak, it does not bar the suit against its insurer, Underwriters. Thus, Underwriters' assertion of res judicata must also fail.

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[11] **FN6. Both Underwriters and the court below have expressly recognized that Underwriters' liability is predicated solely on the liability of its assured, Blue Streak.**

V. CONCLUSION

For the reasons set forth above, we REVERSE the district court's summary judgment and REMAND the case for further proceedings.

Appendix B: Denial of Application for Rehearing dated October 7, 1994.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3539

FILED
OCT 7 1994

GULF ISLAND-IV, INC., and
GULF ISLAND IV a/k/a La Prt,
Plaintiffs-Appellants,

versus

BLUE STREAK-GULF IS OPS a/k/a
Blue Streak, Inc., ET AL., and
LLOYDS UNDERWRITERS OF LONDON,
Underwriters at Lloyds, London
subscribing to policy no. MC9792SAH,
Defendants-Appelles,

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(OCT 7 1994)

Before REAVLEY, JONES and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:
/s/ Fortunado P. Benavides
United States Circuit Judge
8/1/94

Appendix C: Order and Reasons of United States District Court, Honorable Martin L. C. Feldman, J., granting summary judgment to applicant on April 30, 1993.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

GULF ISLAND IV, ET AL	*	**CIVIL ACTION**
VERSUS	*	**NO. 88-2756**
BLUE STREAK MARINE, INC., ET AL	*	**SECTION "F"**

* * * * * * * * * * * * * * *

ORDER AND REASONS

Before the Court is the summary judgment motion of Blue Streak Operations, Blue Streak, Inc., Blue Streak Offshore, Inc., and Blue Streak Marine, Inc.. For the reasons that follow the motion is GRANTED.

I. BACKGROUND

In June 1985, the L/B GULF ISLAND IV, a jackup rig working off the coast of Texas in Matagorda Island Block 668 of the Gulf of Mexico, suffered severe damage when one of its legs collapsed. The vessel was repaired and four months later, Hurricane Juan toppled it again.

The jackup rig was owned by Gulf Island IV, a Louisiana partnership, whose managing general partner was Gulf Island IV, Inc., a Louisiana corporation. The rig was operated by and was under the exclusive control of the defendants Blue Streak Marine, Inc.; Blue Streak Offshore, Inc.; Blue Streak-Gulf Island Marine Operations, a partnership a/k/a Blue Streak/Gulf Island Marine Operations, Inc.; and Blue Streak Operations, Inc.

The rig was covered by two insurance policies, a hull and machinery policy and a protection and indemnity policy, issued by the Employers Insurance of Wausau. And both policies listed the named assured as "Gulf Island Marine; Blue Streak Gulf Island Marine Operations, Inc. (Operator); [and] Oceanic Fleet, Inc."

In December, 1985, the vessel owner, Gulf Island IV, sued American Marine

Underwriters, Inc. and Employers Insurance of Wausau, seeking a declaratory judgment of liability under the hull policy. Gulf Island also sought damages for the defendants' arbitrary and capricious refusal to pay its claim and for breach of a maritime contract.

The case settled, and at the request of the plaintiff's attorney, the court issued a sixty day order of dismissal, with the usual right to reopen if the settlement isn't consummated.

Then in June, 1988, Gulf Island sued Blue Streak Marine, Inc., Blue Streak Offshore, Inc., Employers Insurance of Wausau, and ABC Insurance Company for negligence and breach of warranty of workmanlike performance which caused its jackup rig to collapse in 1985. The plaintiff sought recovery for the damage to

its vessel and the losses sustained during the vessel's downtime. [12]

Blue Streak now moves for summary judgment on the ground of claim preclusion.

II. LAW AND APPLICATION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586

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[12] In January 1990, Judge Carr granted Wausau's motion for summary judgment on the ground that the P&I policy does not provide coverage for damage to the Gulf Island IV inasmuch as it is a scheduled vessel. The case has since been transferred from Section "J" to this Court.

(1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. id. at 249-50 (citations omitted).

In addition, if the party opposing the motion fails to establish an essential element of his case, summary judgment is proper. See Celotex Corp. v. Catreet, 477 U.S. 317, 322-23 (1986).

B. Res Judicata

The test for preclusion based on res judicata is fourfold. In re Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814,

816 (5 Cir. 1988). See also, Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5 Cir. 1983) (en banc). First, a prior judgment must have been rendered by a court of competent jurisdiction. Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 538 (5 Cir. 1990). Second, the prior judgment must have been a final judgment on the merits. Id. Third, the parties or their privies must be identical in each suit. Id. And fourth, both suits must concern the same cause of action. Id.

The United States Supreme Court has held:

> [W]hen a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which

> was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Nevada v. United States, 463 U.S. 110, 129-30 (1983), quoting,, Cromwell v. County of Sac, 94 U.S. 351, 352 (1877). The Court adds that a final judgment puts an end to a cause of action such that it cannot be brought into litigation again between the parties. Id.

The case literature makes it clear that a legal theory or claim is part of the same cause of action as a prior claim if it arises from "the same nucleus of operative facts." Eubanks v. F.D.I.C., 977 F.2d 166, 171 (5 Cir. 1992). See also, In re Air Crash at Dallas/Fort Worth Airport,

861 F.2d at 816. Thus, a court must look to the factual predicate of the claims asserted, not the legal theories upon which the plaintiff relies. Eubanks v. F.D.I.C., 977 F.2d at 171.

Here, Gulf Island asserts that it is now suing different parties for different causes of action and that there was no final judgment in the 1985 case. [13]

However, both of the plaintiffs' suits arose out of the June, 1985 collapse of the L/B GULF ISLAND IV. And, as with this suit, Gulf Island's 1985 suit, entitled Gulf Island IV v. American Marine Underwriters, Inc., et al, Civil Action Number 85-5757, claimed that Blue Streak's

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[13] **The parties do not contest that a court of competent jurisdiction rendered judgment in the 1985 suit.**

employees were negligent. [14]

In addition, the 1985 suit was consolidated for trial with three other lawsuits, one of which named Blue Streak/Gulf Island Operations Partnership as a defendant. [15] And although Blue Streak/Gulf Island Operations Partnership has since dissolved, the Blue Streak entities named in this present lawsuit are alleged to have derivative liability for the fault of Blue Streak/Gulf Island Operations. Thus, the Court finds that Gulf Island has sued a party in privity with the original party for the same cause of action.

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[14] Paragraph XXIII of the 1985 complaint alleges that "substantial evidence supports plaintiff's loss allegations of crew negligence."

[15] The cases were entitled Crown Point Industries, Inc. v. L/B GULF ISLAND IV, et al, Civil Action Number 85-5436; Hope Contractors, Inc. v. Gulf Island Marine, Inc. et al, Civil Action Number 85-5644; and Offshore Tugs, Inc. v. Gulf Island Marine, Inc. et al, Civil Action Number 85-5579. The Hope Contractors case named Gulf Island/Blue Streak as a defendant.

Moreover, the Court is not impressed with the plaintiff's argument that the settlement of the 1985 case was not a final judgment because it was not reduced to writing. The Fifth Circuit has recognized that a sixty day order of dismissal satisfies the writing requirement under Louisiana Law. [16] See Mull v. Marathon Oil Company, 658 F.2d 386, 388 (5 Cir. 1981). And it must be noted that plaintiff never

---

[16] Louisiana Civil Code Article 3071 governs the enforcement ability of a settlement. The article states:

> A transaction of compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on... This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding ....

La. C.C. art. 3071

tried to extend or set aside the court's dismissal order, or reopen that suit.

The Court thus concludes that the requirements for res judicata have been properly met,, and simply because the plaintiff has other available remedies, it may not "assert them serially", in succession actions." See Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d at 539. As a matter of law, Gulf Island is precluded from bringing this suit. Accordingly, the summary judgment motion of the defendants, Blue Streak Operations, Blue Streak, Inc., Blue Streak Offshore, Inc., and Blue Streak Marine, Inc., is GRANTED.

New Orleans, Louisiana, April 29, 1993.

/s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

Appendix D:	Entry of Final Judgment of the judgment of April 29, 1993, pursuant to Rule 54(b).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

GULF ISLAND IV, ET AL	*	**CIVIL ACTION**
VERSUS	*	**NO. 88-2756**
BLUE STREAK MARINE, INC., ET AL	*	**SECTION "F"**

ORDER

CONSIDERING the **EX PARTE MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)** and upon finding that there is no just reason for delay, IT IS ORDERED that the judgment of the Court dated April 29, 1993 be entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. *

NEW ORLEANS, LOUISIANA 24th day of June, 1993

/s/ Martin L. C. Feldman
JUDGE

The remaining issues will be stayed pending appeal and the case administratively closed with the right to reopen, if necessary, once the issues on appeal have been resolved.

Appendix E: Federal Rules of Civil Procedure, Rules 13 and 19.

Rule 13. **Counterclaim and Cross-Claim**

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the

recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim Against the United States.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted Counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the

subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **Joinder of Additional Parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) **Separate Trials; Separate Judgments.** If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 19. **Joinder of Persons Needed for Just Adjudication**

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, or any persons as described in subdivision (a)(1)-(2) hereof who are not joined,, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Petition for Writ of Certiorari have been mailed to the following parties through their attorney of record this 29th day of Dec 94.

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(2)

FILED
JAN 30 1995
OFFICE OF THE CLERK

NO. 94-1186

In the Supreme Court of the United States

OCTOBER TERM, 1994

BLUE STREAK, INC.
BLUE STREAK OPERATIONS, INC.
BLUE STREAK MARINE, INC.
and BLUE STREAK OFFSHORE, INC.
Petitioners

vs.

GULF ISLAND IV, INC.,
and GULF ISLAND-IV, a Louisiana Partnership
Respondents

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENTS GULF ISLAND IV, INC. and GULF ISLAND-IV, a Louisiana Partnership

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BLUE STREAK, INC.
BLUE STREAK OPERATIONS, INC.
BLUE STREAK MARINE, INC.
and BLUE STREAK OFFSHORE, INC.
Petitioners

vs.

GULF ISLAND IV, INC.,
and GULF ISLAND-IV, a Louisiana Partnership
Respondents

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
BY RESPONDENTS GULF ISLAND IV, INC. and
GULF ISLAND-IV, a Louisiana Partnership

STATEMENT OF THE CASE

I. THE 1985 ACTION

In June of 1985, the L/B GULF ISLAND IV capsized in the Gulf of Mexico, while being operated by the now

dissolved partnership of Blue Streak/Gulf Island Operations ("BS-GIO"). In October 1985, after the vessel had been repaired, it suffered additional damage in Hurricane Juan.

On December 18, 1985, the vessel owner, Gulf Island IV, a Louisiana partnership, filed a "Complaint for Declaratory Judgment and Damages" against its hull insurer, Employers Insurance of Wausau ("Wausau"), and American Marine Underwriters ("AMU"). The 1985 action sought a declaration of Wausau's liability under the hull policy and damages for its refusal to pay damages for loss of charter hire resulting from downtime after Hurricane Juan. The 1985 action did not include claims for downtime of the L/B GULF ISLAND IV after the June 28, 1985 casualty or make any claim against any of the Blue Streak entities or any liability underwriters of those entities.

While the 1985 suit was pending, several actions were consolidated with it, including a suit brought by Hope Contractors, Inc. ("Hope Contractors suit"). In the Hope Contractors suit, the plaintiff-contractors named, among others, the following defendants: Gulf Island IV, Gulf Island IV, Inc., Gulf Island Marine, Inc., and "Blue Streak/Gulf Island". The Hope Contractors suit sought payment on an account for post-casualty salvage and repairs to the vessel. Gulf Island impleaded AMU and Wausau, seeking coverage under the hull policy for the salvage and repairs performed by Hope Contractors. It is important to note that "Blue Streak/Gulf Island" was not served and did not appear in the Hope Contractors suit.

On or about September 29, 1986, the Gulf Island

entities and Wausau verbally agreed to a settlement of the claims. The district court entered an Order of Dismissal without prejudice, subject to a reopening of the action within 60 days if settlement was not consummated. Although a form Receipt and Release was drafted by Wausau, it was never executed because it was broader than the terms of the oral settlement discussions and did not comport with Gulf Island's understanding of the proposed settlement. To date, no settlement agreement concerning the 1985 action has ever been signed by the parties nor has any settlement been recited in open court. Accordingly, no final judgment has been entered concerning the 1985 action.

II. THE PARTIES IN THE PRESENT ACTION

On June 27, 1988, Gulf Island IV and Gulf Island IV, Inc. (hereinafter collectively "Gulf Island") filed the instant admiralty and maritime suit against Blue Streak Marine, Inc., Blue Streak Offshore, Inc. (hereinafter collectively "Blue Streak") and Wausau for negligence, breach of warranty of workmanlike performance and for losses due to down time of the vessel resulting from the June 18, 1985 casualty. Blue Streak filed a third-party complaint against Underwriters at Lloyd's, London ("Lloyd's") seeking coverage under its umbrella policy. Blue Streak also filed a cross-claim against Wausau seeking coverage under its own protection and indemnity insurance policy, alleging that the policy required Wausau to protect and indemnify Blue Streak from the claims asserted by Gulf Island.[1] Gulf

[1] Wausau was dismissed from this action on summary judgment based on a finding that coverage did not exist under the policies.

Island later supplemented its complaint to name Lloyd's as a defendant, seeking the benefits of coverage under Blue Streak's umbrella policy.

Blue Streak and Lloyd's filed motions for summary judgment, arguing that *res judicata* bars this action. Specifically, they asserted that the September 29, 1986 dismissal order in the 1985 action bars this action. The district court granted summary judgment in favor of Lloyd's and Blue Streak, following which Gulf Island appealed. The Fifth Circuit reversed as to both Blue Streak and Lloyd's, holding that for *res judicata* to apply, the parties in the present action must to be identical to or in privity with parties in the prior 1985 suit.

The Fifth Circuit found that even assuming arguendo that Blue Streak is in privity with "Blue Streak/Gulf Island," the named but unserved defendant in the 1985 suit, because that entity was not properly before the court in the 1985 action, the identity of the parties' requirement is not satisfied. The court further found that Blue Streak was not in privity with Wausau, the insurer Gulf Island sued in the 1985 action, since Gulf Island sued Wausau in the 1985 action as a named insured under the Wausau hull policy, not in a third party liability context.

Thus, the 1985 action and the instant matter are differentiated by the parties, the causes of action and the damages sought.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT RAISE SPECIAL AND IMPORTANT REASONS FOR REVIEW

Petitioner asserts that this Court should grant certiorari because this case presents an important question of federal law which has not been, but should be settled by this Court. Petititon cites *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), in which this Court eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided in earlier federal court suits. Since *Blonder-Tongue*, this Court has affirmed the elimination of the mutuality rule in the issue preclusion setting. See e.g., *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); *Nevada V. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983). The elimination of the mutuality rule for issue preclusion has been widely accepted by the courts of appeals. The courts have not, however, expanded the elimination of the mutuality rule beyond issue preclusion to claim preclusion, as petitioner would have this Court now do. Thus, there is no conflict between the circuits and this Court on the application of the mutuality rule to claim preclusion.

It is an established principle that this Court will only adjudicate actual, ongoing controversies. *Honig v. Doe*, 484 U.S. 305, 317, 108 S. Ct. 592, 601, 98 L. Ed. 2d 686 (1988). The judiciary, including this Court, is not empowered to render advisory opinions. *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 2334, 45 L. Ed. 272

(1975). Additionally, as this Court has recognized, "jurisdiction was not conferred upon this [C]ourt merely to give the defeated party . . . another hearing." *Magnum Import Co. v. Coty,* 262 U.S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922 (1923). Moreover, this Court has defined "special and important" reasons which warrant review as those that reach beyond the academic and episodic. *Rice v. Sioux City Memorial Park Cemetary,* 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955).

> It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne C. Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923).

In the present matter, Blue Streak has not provided any basis for review upon petition for writ of certiorari by this Court. As indicated above, no conflict exists between the decisions of this Court and the courts of appeals. Further, no unresolved issue of law exists. While petitioner raises a concept which is possibly of interest from a scholarly standpoint, is not appropriate for review on petition for writ of certiorari.

II. THE REQUISITES OF CLAIM PRECLUSION ARE NOT SATISFIED IN THIS MATTER.

In order for claim preclusion to apply, four requirements must be met. First, the parties in the instant action must be the same as or in privity with the parties in the prior action in question. Second, the court that rendered the prior judgment must have been a court of competent jurisdiction. Third, the prior action must have been terminated with a final judgment on the merits. And fourth, the same claim or cause of action must be involved in both suits. *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994).

Here, the Fifth Circuit was correct in rejecting Blue Streak's assertion that the parties hereto need not be identical to or in privity with the parties in the prior suit for claim preclusion to apply. As set forth above, this Court eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal court suits, but did not eliminate in *Blonder-Tongue* the mutuality requirement for claim preclusion.

Accordingly, the Fifth Circuit correctly held that the indentity of the parties requirement is not satisfied in this matter. Even assuming arguendo that Blue Streak was in privity with the named but unserved "Blue Streak/Gulf Island", because that party was never properly before the court in the 1985 action, the identity of the parties requirement is not satisfied. Petitioner's alternative argument, that it is in privity with Wausau, Gulf Island's insurer against which it had brought first party claims in the 1985 action, was rejected for similar reasons. Wausau was a

defendant only with regard to the hull policy coverage dispute brought by its insured, Gulf Island, not as the liability insurer of the negligent third party, Blue Streak. Accordingly, the Fifth Circuit found Wausau was not so closely aligned to Blue Streak's interest (if any) in the 1985 ~~action as to~~ be Blue Streak's representative.

It is important to note that even if the mutuality requirement of claim preclusion were eliminated, claim preclusion would remain inapplicable herein as a result of the fact that Blue Streak cannot satisfy the remaining requirements for claim preclusion to apply. Although the Fifth Circuit did not reach these issues as a result of the finding that the mutuality requirement had not been satisfied, even a brief review of the facts indicates that the other requirements of claim preclusion cannot be satisfied in this matter.

For example, it is clear that the 1985 action did not terminate with a final judgment on the merits. The parties in the 1985 action agreed on a preliminary basis to a settlement and so advised the district court. The court entered an order of dismissal without prejudice, expressly reserving the right to reopen the action within 60 days if the settlement was not consummated. Because the parties could not agree on the breadth of the settlement, the settlement was never consummated and the minimal settlement check never negotiated. Thus, the settlement was never consummated as contemplated by the order and final judgment was never rendered. A dismissal such as in the present matter, entered into by agreement of the parties without prejudice, does not have preclusive effect, and accordingly does not bar a second suit on the basis of claim preclusion. *Plumberman, Inc. v. Urban Systems Development Corp.*,

605 F.2d 161, 162 (5th Cir. 1979); *American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3, 9 (5th Cir. 1974).[2]

Additionally, the same claim or cause of action was not involved in both suits. The 1985 action involved a cause of action against the hull underwriters by Gulf Island as an assured under the hull policy. Similarly, the consolidated Hope action in which "Blue Streak/Gulf Island" was named but not served as a defendant, was a suit against Gulf Island on an account for salvage and repair of the vessel arising from the hull underwriters' failure to make the required payments. Blue Streak's operational negligence was never at issue in either the 1985 action or any action consolidated therewith, including the Hope contractors action. Blue Streak's negligence has never been put at issue prior to the instant action. In sum, claim preclusion will not apply in this matter, regardless of the application of the mutuality rule.

III. MUTUALITY IS AN ESSENTIAL ELEMENT OF CLAIM PRECLUSION AND NECESSARY TO ENSURE FAIRNESS TO THE PARTIES.

Blue Streak alleges that the mutuality rule should no longer apply to the doctrine of claim preclusion and that this Court should eliminate the requirement in the interest

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[2] Additionally, even if a final judgment on the merits had been reached in the 1985 suit and actions consolidated therewith, Blue Streak was not a party and its liability was never at issue. When "an outsider is not before the court, he cannot be bound by the judgment rendered." *Provident Tradesmen Bank & Trust v. Patterson*, 390 U.S. 102, 110, 88 S. Ct. 733, 738, 19 L. Ed. 2d 936 (1968). Accordingly, "a judgment is not res judicata as to . . . a non-party." *Id.*

of judicial economy. Blue Streak suggests that eliminating the mutuality rule for issue preclusion, but not with regard to claim preclusion, is an unsound distinction, although neither this Court nor any federal appellate court has so indicated.

Blue Streak's argument for the elimination of the mutuality rule in the claim preclusion setting, while potentially appealing in its simplicity, is without merit. Claim preclusion and issue preclusion are distinct doctrines, with different objectives and requirements. *Allen,* supra, 449 U.S. at 94, 101 S. Ct. at 415; *Shanbaum,* supra at 310-11. Claim preclusion, or "pure" *res judicata,* conserves judicial resources and protects litigants from multiple lawsuits by prohibiting either party from raising any claim or defense in a latter action to which they are a party that was or could have been raised in support or in opposition to the cause of action asserted in the prior action. See e.g., *In Re Howe,* 913 F.2d 1138, 1144 (5th Cir. 1990). In contrast, issue preclusion promotes the interest of judicial economy by treating specific issues of fact or law that are validly and necessarily determined as final and conclusive.

The basis for eliminating the mutuality rule with respect to issues fully litigated is inapplicable in a claim preclusion setting. Issue preclusion requires that the issue be identical to the issue vigorously and necessarily decided in the prior case and there must be no special circumstances that would render preclusion inappropriate or unfair. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326-32, 99 S. Ct. 645, 649, 588 L. Ed. 2d 552 (1979).

In contrast, for claim preclusion to apply, there is no

requirement of identity of the issues, since claim preclusion applies to matters which could have been raised but were not. Similarly, claim preclusion does not require the claim to have been vigorously litigated in the prior action and necessary to support the judgment, but only that it could have been brought. Finally, claim preclusion, unlike issue preclusion, does not require an examination of special circumstances which might exist which would render preclusion inappropriate or unfair.

Thus, the focus for claim preclusion is on the parties, while the focus for issue preclusion is on the issues. Eliminating the mutuality rule for issue preclusion is appropriate as a result of the stringent safeguards provided by the remaining elements of issue preclusion, particularly the fact that the identical issue must have been fully litigated by or against the party against whom issue preclusion is offensively raised. However, because claim preclusion will eliminate the relitigation of all claims which could have been raised by the parties or their privities, by necessity the parties requirement, i.e., the mutuality rule, must remain. Clearly, the claims that are or could have been raised in a particular action are dependent upon the parties. While it is reasonable and logical to apply claim preclusion to these parties and those in privity with them, it is unsupportable to go beyond that limitation.

As indicated above, Blue Streak attempts to make an issue out of a historically grounded and equitable rule of law simply because it cannot challenge the Fifth Circuit on other grounds. The reasons for eliminating mutuality do not apply to claim preclusion. If the mutuality rule were to be eliminated, it would produce the very effect that con-

cerned this Court in *Blonder-Tongue*, namely that a party would be denied his right to litigate his grievances in an open court of law. Therefore, petitioner's stab at a doctrine unmarked with controversy, at the risk of sacrificing due process and equity, should be denied.

CONCLUSION

This case does not present a question of federal law which has not been, but should be, settled by this Court. On the contrary, petitioner asks this Court to discard a rule of law that has been widely accepted and applied without issue by this Court and the federal courts of appeals. Additionally, not only did the Fifth Circuit correctly hold that the identity of parties requirement had not been met in this matter, the other elements of claim preclusion also have not been satisfied.

Finally, petitioner's novel assertion that the mutuality rule should no longer apply to claim preclusion is based upon faulty reasoning. The rationale for the elimination of the mutuality requirement for issue preclusion is inapplicable to claim preclusion. Respondent, Gulf Island IV, therefore, respectfully requests the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Opposition to Blue Streak, Inc.'s Petition for Writ of Certiorari have been mailed to the following parties through their attorney of record this 30th day of January, 1995.

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